SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

No. 615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA
AND
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court for the Northern District of California

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MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the Household Goods Forwarders Association of America, Inc., CTI-Container Transport International, Inc., Columbia Export Packers, Inc., Home-Pack Transport, Inc., Imperial Household Shipping Co., Inc., Routed Thru-Pac, Inc., Smyth Worldwide Movers, Inc. and Vanpac Carriers, Inc., Intervening Defendants in the proceeding below, jointly move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a Three-Judge District Court unanimously dismissing appellants' suit to set aside two orders of the Interstate Commerce Commission issued in *Kingpak, Inc., Investigation of Operations,* 103 M.C.C. 318 (1966).

The proceedings before the Commission had their origin in complaints and petitions filed by appellant household goods carriers and their rate filing bureau to have declared unlawful a successful innovation in the transportation of household goods, developed and perfected by intervening appellees, known as the Door-to-Door Container Service. As the Interstate Commerce Commission found, Door-to-Door Container Service permits the movement of household goods from residence to residence in a container eliminating rehandling of the shipment in transit, and often at a more economical rate, which service resulted from the rapid improvement in containerization, and which service was offered by the exempt freight forwarders. *Kingpak, Inc., Investigation of Operations, supra,* p. 321. This new containerized service uses rail carriers, certificated general commodity carriers, certificated van lines, air carriers, and water carriers operating under the jurisdiction of the Federal Maritime Commission to move shipments in the manner best suited for the needs of the shipper. This service competes with the services of appellants which is limited under their I.C.C. certificates to movements of household goods loose in vans, in the conventional manner, and which involves the rehandling referred to by the Commission. It is the shipper acceptance of the Door-to-Door Container Service which underlies the present litigation.

Although extensive hearings were held before the Commission resulting in a comprehensive record, appellants chose in making its appeal to the Three-Judge District Court not to present any part of the record below. As a result,

there is no issue in this case that the Commission acted arbitrarily or capriciously, or that the evidence of record did not support its conclusions, the appeal being artificially restricted to certain "legal" issues, with no consideration being given to the substantial factual foundation upon which the Commission's conclusions are posited.

In a detailed opinion, the Three-Judge Court carefully analyzed each and every argument raised by appellants and concluded that the action of the entire Commission below was proper in every respect.

QUESTIONS PRESENTED

1. Has the Court erred in affirming the decision of the Interstate Commerce Commission that joint loading is a form of shipment consolidation within the purview of the Interstate Commerce Act?

2. Has the Court erred in affirming the Commission's consistent holding that it can properly regulate that part of a freight forwarding operation which takes place within the United States?

3. Has the Court erred in following the procedure of terminating this lengthy litigation after issuing specific guidelines for the future operation of the Door-to-Door Container Service?

4. Has the Court erred in affirming the Commission's right to announce its intention to process over 200 applications for limited local motor carrier authority under so-called modified procedure, rather than to set each application for full oral hearing?

ARGUMENT

We respectfully submit that the subject case, wherein appellants have had a thorough hearing and consideration before the Interstate Commerce Commission and before a Three-Judge Court, is not a case which warrants plenary consideration by the Supreme Court. See *National Motor Freight Traffic Assn., Inc., et al. v. The United States of America and Interstate Commerce Commission, et al.*, October Term, 1968, No. 355.

Apparently in their zeal to generate interest and enhance the importance of this case, appellants make an unfortunate misstatement. They argue that unless the decision below is overturned, motor carriers may be forced "into a satellite status, *vis-a-vis,* the forwarders" and there is then a statement that these forwarders are authorized "to contract with motor carriers at other than [less than] tariff rates for most of the physical services for which a forwarder must use a regulated motor carrier." (Appellants' Jurisdictional statement, p. 6). As the Commission and the Court below found, the forwarders here involved are specifically exempted from the Interstate Commerce Act for the transportation of their commodity, *viz.*, used household goods, under Section 402(b)(2) of the Act. *Cf.*, "The case here is one in which the operations of the third parties [forwarders] are exempt from regulation . . . " (Appellants' Jurisdictional Statement, p. 7). There is no provision in the Interstate Commerce Act, nor is there one cited which permits an exempt forwarder to pay underlying carriers anything other than tariff rates. In fact, the Interstate Commerce Commission specifically held in the proceeding below that the freight forwarders involved in this proceeding were required to pay full tariff rates. Thus the primary basis relied upon by appellants in seeking to interest the United States Supreme Court in a detailed review of the decision is erroneous.

1. Appellants first argue that the Commission and the Three-Judge Court were in error in holding that the joint loading of containers is a form of consolidation. Not only is this attack on the decision below not supported by a single case, but no attempt is even made to distinguish the cases upon which the Commission and the Court below relied in reaching their conclusion. Appellants rely solely upon a reargument of its very own version of selected exerpts from the legislative history of the Interstate Commerce Act. The distortions, omissions and conclusory interpretations by appellants were properly evaluated by the Commission and the Court below, and rejected.

In its most favorable light, the legislative history referred to by appellants shows that in connection with the regulation of freight forwarders of other than exempt commodities, *viz.*, used household goods, Congress feared the creation of a super regulated forwarding agency which would have control of the routing of all traffic. (Jurisdictional Statement, p. 11). As a result, in enacting Part IV of the Interstate Commerce Act, Congress prohibited one forwarder from using the services of another, while carving out a specific exception from this prohibition to permit joint loading between regulated forwarders.

Obviously, this specific statutory permission to engage in joint loading is not required for forwarders exempt from the entire terms of the subject statute. In other words, appellants are renewing their argument, without additional support, already rejected by the Commission and the Court, that joint loading is a form of consolidation reserved solely for regulated forwarders. *Kingpak, supra,* p. 328.

We also point out that appellants do not distinguish the cases relied upon by the Commission and the Court in concluding that consolidation of shipments can be performed in many ways, including joint loading, citing *Hopke, Freight Forwarder Application,* 265 I.C.C. 726 (1950); *Barge Service Corp., Freight Forwarder Application,*

285 I.C.C. 249 (1953); *Twin City Shippers Association, Freight Forwarder Application,* 260 I.C.C. 307 (1944); *Kelley, Freight Forwarder Application,* 260 I.C.C. 315 (1944); *Empire Freight Co., Freight Forwarder Application,* 265 I.C.C. 109 (1947).

2. Turning to their next proposition appellants argue, again without any case support, that the Commission and the Three-Judge Court were wrong in holding that the Interstate Commerce Commission could properly regulate that part of a freight forwarder operation which took place between points in the United States. It is interesting to note that the persons who are potentially subject to regulation, *viz.*, the intervening appellees, do not oppose this exercise of Commission jurisdiction; it is difficult to even understand how regulated carriers, *viz.*, the appellants, could have any legitimate objection to the Commission's assertion of regulatory jurisdiction over their competitors.

Beyond this, the Commission consistently since 1948 has asserted jurisdiction over that part of forwarding operations conducted between the United States and foreign countries to the extent that part of such movement occurred within the United States. Appellants fail to distinguish the cases relied upon by the Commission and the Court as follows: *Adanac Freight Forwarders Ltd., Freight Forwarder Application,* 265 I.C.C. 493 (1948); *B.C. Forwarding Co., Freight Forwarder Application,* 265 I.C.C. 308 (1948); *Chi-Can Freight Forwarding Ltd., Freight Forwarder Application,* 310 I.C.C. 693 (1960); *National Carloading Corp., Alaska and Hawaii "Grandfather" Application,* 323 I.C.C. 195 (1964); and *Alltransport Incorporated, Freight Forwarder Application,* 325 I.C.C. 183 (1965).

Appellants' argument is based solely upon the definition of "interstate or foreign commerce". However the legislative history cited by appellants merely establishes that interstate and foreign commerce were defined to avoid the

technical problems of interpreting the meaning of the word "trans-shipment" (Jurisdictional Statement, p. 14); it in no way undercuts the consistent assertion of jurisdiction by the Commission or the language of the statute.

3. Appellants' third point is purely a matter of procedure, *viz.*, whether or not the Commission could terminate a proceeding which it has instituted, upon finding that it had served its purpose, and without issuing a cease and desist order; and whether it could properly find that a complainant had not sustained its burden of proof. There is no showing in the appeal specifically identifying how the Commission and the Court have erred.

4. Lastly, there has not even been an attempt by appellants to demonstrate that the Court below erred in holding that a request for an oral hearing, in connection with an application to be processed in the future, is premature and cannot be considered until after exhaustion of administrative remedies. (Court Opinion in No. 47646, p. 10). What is obviously premature for a District Court is even more so for the Supreme Court of the United States.

CONCLUSION

It is respectfully submitted that none of the questions raised by appellants warrant plenary consideration of this Court. The judgment of the Three-Judge District Court should be affirmed.

Respectfully submitted,

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